No. 83030-4

SUPREME COURT OF THE STATE OF WASHINGTON

TWIN COMMANDER AIRCRAFT, L.L.C., formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION, Petitioner

v.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA BARAJASA VASQUEZ, VIRGINIA DESPOSORIO BARAJAS, ULISES DESPOSORIOS BARAJAS, TEOFILO UVALDO DESPOSORIOS CABRERA, and IRENE SANTIAGO NAVA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARCELINO GONZALEZ ALCANTARA, and on behalf of ROSARIO FLORES ALVARADO, EDUARDO GONZALEZ FLORES, DANIEL GONZALEZ FLORES and CHRISTIAN NANYELI GONZALEZ FLORES,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA MAGALLANES, ERICK GALINDO ESCAMILLA and LILLIAN ITZE GALINDO ESCAMILLA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF PABLO LOZADA LEGORRETA, and on behalf of MARIA DE LOURDES ESQUIVEL AVALOS, GERSON FABRICIO LOZADA ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL and PRISCILLA LOZADA ESQUIVEL,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF CESAR GABRIEL MAYA, and on behalf of STEPHANIE GUADALUPE MAYA TRIUJEQUE and DIEGO HANNIEL MAYA TRIUJEQUE,

ORIGINAL

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JESUS ARCINIEGA NIETO, and on behalf of ANGELICA MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ and CONSUELO NIETO TAPIA, and

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE ELIZARDI, Respondents

---

SUPPLEMENTAL BRIEF OF RESPONDENTS

Gene S. Hagood, SBT 08698400
Thomas W. Bingham, WSBA 7575
Attorneys for Respondents

Gene S. Hagood
Hagood, Neumann & Huckeba, LLP
1520 E. Highway 6
Alvin, Texas 77511
Telephone: 281-331-5757
firm@hnhlawyers.com

Thomas W. Bingham
Krutch, Lindell, Bingham, Jones & Petrie, P.S.
1420 Fifth Ave., Suite 3150
Seattle, Washington 98101
Telephone: 206-682-1505
twb@krutchlindell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The Supreme Court granted Twin Commander Aircraft Company's ["TCAC"] Petition for Review, and denied review of the issues raised by Burton, on October 1, 2009. A copy of the Supreme Court's Order is in the Appendix at pages 1–4.

II. ISSUES PRESENTED FOR REVIEW

1. Whether, under established summary judgment review standards, TCAC's evidence conclusively negated or Burton's evidence raised fact issues that TCAC knowingly misrepresented or concealed or withheld required information to the FAA that is causally related to the harm. GARA § (2)(b)(1).

2. Whether TCAC is legally entitled GARA "manufacturer" status based solely on its status as an FAA type-certificate holder.

III. ARGUMENT

1. Under established summary judgment review standards, TCAC's evidence did not conclusively negate and Burton's evidence raised fact issues that TCAC knowingly misrepresented or concealed or withheld required information to the FAA that is causally related to the harm. GARA § (2)(b)(1).[1]

In accordance with well recognized and long established summary judgment review standards[2], Washington's Division I Court of Appeals

[1] TCAC is not entitled to GARA's immunity and therefore this exception becomes moot if the Court finds that TCAC is not a GARA "manufacturer". See ARGUMENT III. 2.
[2] Brief of Appellants at pp. 10-12; Reply Brief of Appellants at pp. 1-2.

ruled that, as a matter of law, TCAC did not meet its burden because there were triable issues that should be resolved by a finder of fact.

TCAC, in its attempt to cast the Appellate Court's decision as being clearly erroneous, cites Burton's experts' declarations as its own summary judgment evidence in its "opening materials" and then argues that this same evidence cannot be considered in Burton's response in opposition to TCAC's Motion. In its "Evidence Relied Upon" section, TCAC "in support of its motion, . . . relies upon . . ." Burton's Original and Amended Complaints, TCAC's Amended Answers, the Declarations of Burton's experts Sommer, Donham, Hood and Twa, Burton's Response to TCAC's [withdrawn] Motion to Dismiss and TCAC's Type-Certificate Data Sheet for the 690C aircraft at issue (CP 881–902, et. seq.). Essentially, TCAC willingly accepted those portions of Burton's experts' Declarations that helped establish its own Type-Certificate holder status, while denying the admissibility of those portions of these same declarations that identified SB235 as the defective product and, along with TCAC's FAA Form 8110-3 filing, the vehicles for TCAC's misrepresentations, concealments and withholdings of "required information" from the FAA and that these actions were the proximate causes of the fatal crash. TCAC never provided any competent summary judgment evidence conclusively establishing it did not knowingly misrepresent, withhold or conceal "required information" from the FAA. Because TCAC allegedly performed an "intensive review", including "all

the break-ups we have records of", to write SB235, TCAC certainly had the ability to provide sworn testimony to refute Burton's evidence and support their attorneys' argument if the evidence was available; yet they proved no such thing. Only later did "rebuttal documents", as part of TCAC's summary judgment reply in violation of *White v. Kent Medical Center, Inc.*, 61 Wn.App. 163 (1991), provide some such evidence, albeit insufficient and incompetent, to satisfy its summary judgment burden (CP 1336-1393, et seq.). Specifically: (1) Geoffrey Pence's Declaration (CP 1183-1186) is irrelevant to this issue; (2) Pierre DeBruge's Declaration (CP 1177-1180) does more to support Burton's position than TCAC's. As the individual responsible for working with the FAA to identify any potential problem with the rudder, the steps necessary to address the problem and the issuance of SB235, TCAC provided no information concerning his qualifications to do so (other than he was an "engineering manager") and confirmed, through the absence of discussion, no notice to the FAA of the "required information" from the 1970, 1979, 1982, 1992 events and their relevance to the 2002 and 2003 in-flight break-ups and SB235. The convenient ambiguity of his testimony about "sharing and discussing" information speaks volumes. With full opportunity to refute Burton's evidence, TCAC did not. The conclusory nature of Mr. DeBruge's comment that he did not withhold or conceal information from or misrepresent to the FAA without specific reference to or discussion of these events renders it incompetent summary judgment evidence; (3)

Exhibits B (CP 1187-1188), D (CP 1328-1335), F (CP 1339-1346) and G (CP 1347-1361) all contain inadmissible probable cause reports and are incompetent summary judgment evidence;[3] (4) Exhibit C (CP 1189-1327) is Rockwell's investigation into the 1970 flutter related crash of prototype model 690C and is thoroughly discussed and relied upon by Burton; and (5) Exhibit E, trip report (CP 1336-1338) is likewise discussed and relied upon by Burton.

Recalling that "required information" that must be disclosed includes, among numerous others, information under a "regulation" (Respondents' Answer at p. 7), Federal Aviation Regulation (FAR) 21.3 requires type-certificate holders to notify the FAA if they become aware of any failure, malfunction or defect in any product, part, process or article that results in any subsection (c) failures including "abnormal vibration", i.e., flight flutter. Flight flutter usually occurs in control surfaces such as the rudder and can cause in-flight break-ups of the aircraft. As a significant flight safety issue, any potential for this must be fully investigated and disclosed to the FAA per FAR 21.3. (CP 1009-1038 – Donham Dec.; CP 1126-1144 – Donham Supp. Dec.) The FAA relies upon type-certificate holders to fully provide them all the "required information" for such significant flight safety problems through FAA Form 8110-3, "Statement of Compliance with the Federal Aviation Regulations" with such substantiating data as is necessary that certifies, by

[3]Appellants' Reply Brief, at p. 19

signature of the type certificate holder, full compliance. (CP 691-699 – Twa Dec.; CP 1120-1125 – Twa Supp. Dec.). The FAA then receives the 8110-3 form with any attachments and either approves or denies the requested action, i.e., issuance of a service bulletin (SB), airworthiness directive (AD), etc. (CP 691-699 – Twa Dec.).

The analysis of the "required information" TCAC was charged to investigate and report to the FAA per GARA and Form 8110-3 SB235 filings, begins in 1970 during Gulfstream's type certificate developmental testing phase of the predecessor to the accident Model 690C, Model 690. (CP 1126-1144 – Donham Supp. Dec.). On June 26, **1970**, a prototype 690 suffered an in-flight break-up of its rudder and crashed during a test flight. Investigation revealed that the crash was caused by a flutter problem of the dynamic coupling between the rudder tab and the rudder and fin modes within the rudder assembly. Engineering analysis concluded that to obtain adequate flutter margins, an increase of the rudder horn (cap) balance weight from 8 to 12 pounds was necessary. (CP 1126-1144 – Donham Supp. Dec.; CP 2544-2683 – Report No. S122-049 – Vertical Tail Flutter). TCAC, pursuant to its 8110-3 and FAR 21.3 obligations as the current Type Certificate holder and charged with this knowledge from its own archived documents, did not report this break-up and its Form 8110-3 SB235 significance to the FAA even though TCAC charged Geoffrey Pence with the responsibility of "investigating all the break-ups we have records of.". (CP 1126-1144 – Donham Supp. Dec.)

In **1979**, for Model 690C (accident aircraft) type certification purposes, in order to substantiate to the FAA that the 690C's redesigned rudder assembly, based upon but redesigned from the Model 690 rudder assembly (above), was free from flutter and vibration, the Civil Aviation Regulations (CAR) required complete flutter and vibration analyses with reports. These flutter test reports reveal misrepresentations to the FAA, now charged to TCAC as the current type-certificate holder who withheld from and did not correct these misrepresentations to the FAA again pursuant to its 8110-3, FAR Part 21.3, and GARA "required information" obligations. The required flutter and vibration testing per CAR §§ 3.159 and 3.311 had, in fact, not been properly performed, to-wit: (1) the rudder tab system found to be the problem in certifying the 690 was excluded from the required 690C flutter analysis, (2) the 690C test aircraft was not flown to its required full flight envelope including the most critical configuration, (3) a 4.12 pound rudder balance weight in the mathematical flutter analysis was used instead of a 12 pound weight as previously recommended to correct flutter problems, and (4) the 690C test aircraft was not configured as required to type certification configuration. (CP 1126-1144 – Donham Supp. Dec.; CP 2207-2413 – Report No. S12-092, "Flutter and Vibration Analysis & Test Substantiating Model 690C"; CP 2417-2542 – Report No. S12-102, "Flutter Parameters Required for Basic Flutter Substantiation of 690C/D, 695A"). The 690C was certified by the FAA anyway under the then existing Delegation Option Authority (DOA)

process after the manufacturer advised the FAA that all necessary tests under the FARs had been performed, when they had not.

On March 28, **1982**, a type certified Model 690C suffered an in-flight break-up and crashed in Arkansas. While the main focus of the investigation centered on the left wing, it is important that the rudder horn (cap) assembly was never found, a fact suspiciously similar to the 2003 SB235 reported Texas and Georgia in-flight break-ups, determined to be flutter related (CP 1009-10378 – Donham Dec.), where neither rudder cap was found.[4] This event and similarity were not reported to the FAA by TCAC per its Form 8110-3, FAR Part 21.3, and GARA obligations. (CP 2969-3296 – Report No. S16-062, Accident Investigation re: 1983 Arkansas Crash).

In **1992**, another TCAC 690C rudder failed in flight causing in-flight break-up and a catastrophic crash near Denver. (CP 2698-2965 – Accident Investigation re: 1992 Colorado Crash). The rudder cap was recovered and TCAC's testing determined that the vertical rudder spar failed in a twisting force below the rudder cap and above the design load while the aircraft was being operated within its operational flight envelope. (CP 1009-1038 – Donham Dec.; CP 2698-2965 - Accident Investigation re: 1992 Colorado Crash) This rudder failure was described

[4] While in 1982, a missing rudder cap may not have been overly significant, the proven subsequent events raise the significance substantially. Under *Butler*, Type Certificate holders' ongoing obligation to monitor accidents for repeated patterns of failure that indicate emergent unsafe conditions and report these conditions to the FAA was unambiguously confirmed.

in an internal memo by Jeff Cousins, TCAC's V.P., as "identical" and the "same" as the SB235 reported Texas and Georgia in-flight rudder break-ups. (CP 4356-4357 – 4/4/03 e-mail from Jeff Cousins re: rudder inspections). Burton's flight flutter expert, Robert Donham, concluded that, based on the damage pattern to the rudder and that it failed above the design load, this rudder also failed as a result of rudder flutter. (CP 1135 – Donham Supp. Dec. at p. 10) TCAC again concealed and withheld from the FAA the "identical"/"same" nature of this rudder failure in relation to the SB235 FAA 8110-3 filing, and its FAR Part 21.3 and GARA obligations. (CP 1126-1144 – Donham Supp. Dec.; CP 691-699 – Twa Dec.; CP 2207-2413 - Report No. S12-092, "Flutter and Vibration Analysis & Test Substantiating Model 690C"; CP 2417-2542 – Report No. S12-102 – "Flutter Parameters Required for Basic Flutter Substantiation of 690C/D, 695A; CP 2698-2965 – Accident Investigation re: 1992 Colorado Crash). Additionally, TCAC's investigation into this crash confirms that it also knew at that time of another "four known cases (and possibly more) of the [rudder] horn [cap] departing the rudder." (CP 1336-1338 – 4/26/93 Trip Report; CP 4858-5233 – NTSB Report re: Dec. 1992 Casper Air Crash, Denver, Co.). Once again, this critical information was not revealed but was withheld and concealed from the FAA in TCAC's SB235 Form 8110-3 filing, and pursuant to its FAR Part 21.3 and GARA obligations.

In 2002 and 2003, the two most recent incidents of rudder failure

occurred. (CP 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections). As in the 1992 Denver incident, it was determined that these rudder failures were below the rudder cap and appeared "identical"/"same" as Denver's catastrophe. *Id.* .

On April 17, **2003**, *via* its SB235 form 8110-3 FAA submission, TCAC confirmed that SB235 "represents the position of [TCAC] on this issue" (CP 4374-4376) - after receiving "reports from the field" (4 of its service centers) that some rudder caps were showing signs of cracking and other alarming deterioration, "investigating all the break-ups we have records of", performing an "intensive"/"careful review" by "extremely competent and experienced people" because TCAC owes it to the "owners, passengers and the FAA to see that these critical components were inspected . . .". (emphasis added) TCAC's Pierre DeBruge reported only the Texas and Georgia incidents to the FAA and none of the other referenced "required information". (CP 4363-4371 – SB235 4374-4376). Further, in addition to the information withheld, concealed or misrepresented previously identified in Burton's Answer (pp. 8-9) although TCAC's internal memo confirmed (1) it had no evidence that the caps were the primary cause (yet SB235 requires replacement) and (2) there were also numerous cracks found in the lower horizontal ribs (yet this was an area not required to be inspected per SB235), this information was not disclosed. (CP 2199 – April, 2003 e-mails to/from Jeff Cousins; 4356-4357 - 4/4/03 e-mail from Jeff Cousins re: rudder inspections).

TCAC further marginalized these serious problems by withholding or concealing that the 1970 Model 690 rudder flutter problem was carried over to the 690C by virtue of improper flutter testing procedures for type certification in 1979, the rudder horn assembly was not found in the 1982 Arkansas in-flight break-up, and it knew as far back as 1993 there were "four known cases (and possibly more)" similar failures in addition to the 1992 Model 690C Denver incident that was rudder flutter related and "identical"/"same" as the Georgia and Texas rudder failures. (CP 4858-5233 – NTSB Report re: Dec. 1992 Casper Air crash, Denver, Co.).

The clear evidence is that TCAC was fully aware of this pattern of similar rudder failures over a number of years and incidents. They had connected at least some if not all of the dots but misrepresented what the dots said and withheld and concealed the rest of the dots for this rudder flutter critical flight safety information from the FAA, contrary to GARA and the FARs. TCAC also failed to correct misinformation previously supplied to the FAA concerning the inadequate 1979 rudder flutter type certification testing of 690C. *Butler*, *supra*.. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.; CP 1120-1125 – Twa Supp. Dec.). No flight flutter testing or engineering analysis was conducted by TCAC, per the "required information" criteria, to determine why rudder flutter problems on their aircraft continue to exist or to determine the solution. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.). In order to rule out a flight flutter problem, TCAC would have had

to perform in-flight flutter testing. This fact was never presented to the FAA and the testing was never done. (*Id.*). Despite the serious and dangerous nature of flight flutter, TCAC actually misrepresented to the FAA that a one-time visual inspection of the rudder cap area was adequate, when in fact, it was not. Because the fatigue cracking was noted to be progressive with time in service, it most certainly required not just a one-time visual inspection as recommended by TCAC. At an absolute minimum, recurring inspections of the rudder using much more extensive procedures such as dye penetrant testing, eddy current testing, ultrasonic testing, microscope testing and the removal of paint. (CP 711-715 – Hood Dec.; CP 1145-1146 – Hood Supp. Dec.; 675-681 – Sommer Dec.). The entirety of the correspondence between TCAC and the FAA regarding SB235 confirms no other "required information" was provided to the FAA, a clear violation of GARA's (2)(b)(1) withholding exception.

In that Model 690C is the model aircraft that was type-certificated incorrectly related to rudder flutter and crashed in 1992 with the "same"/"identical" rudder failure characteristics as the disclosed 2002 and 2003 in-flight break-ups (found by Donham to be rudder flutter related), it would be difficult to imagine any information more relevant of which the FAA should have been told in TCAC's Form 8110-2 SB235 filing. Yet, TCAC inexcusably did not report or correct these misrepresentations. Obviously, to do so would have revealed a flutter problem endemic to TCAC's fleet – better to minimalize and isolate the problem than

implicate its fleet. It should come as no surprise that another 690C (the instant case) crashed due to the same rudder flutter problem that was concealed by TCAC from the FAA. And there will be others unless this issue is properly investigated, analyzed, reported and corrected.

Will the trier of fact ultimately accept Burton's experts' opinions and conclusions about the rudder flutter cause of the 1992 and 2002 and 2003 in-flight break-ups? Burton and his experts certainly think so; TCAC probably does not. But in this summary judgment de novo review, it does not yet matter who the jury will ultimately decide is correct. What does matter now is that Burton's highly qualified, nationally recognized experts, based on sound engineering principles, believe it to be so and have so sworn. And their testimony is before the Court to be accepted as true with all reasonable inferences indulged in Burton's favor as fact issues. Under this standard (and even a far more strict trial standard), not even TCAC could deny that these prior similar rudder flutter-related in-flight break-ups would be "required information" that must have been divulged in its Form 8110-3 SB235 filing with the FAA. This would be true even if TCAC missed rudder flutter as the primary cause – the TCAC confessed "identical"/"same" nature of the 1992 690C rudder failure demands it be divulged as do the other "4 known cases (and possibly more) of the [rudder] horn [cap] departing the rudder". Then, perhaps the FAA could have done TCAC's job to fully investigate these related, prior similar failures and report the real solution. Instead, the FAA got TCAC's

false assurances that it fully complied with the FARs, providing all the GARA "required information" that its "extremely competent and experienced personnel" had "fully investigated all break-ups it has records of" because of the obligations TCAC owed to its "owners, passengers and the FAA . . ." This Court, as in *Robinson v. Hartzell Propeller, Inc.*, 326 F.Supp.2d 631 (D. Pa. 2004), is therefore faced with conflicting conclusions by the parties' experts from the same evidence. This issue was resolved in *Robinson* as Burton requests it be resolved here. Applying appropriate summary judgment review standards,

> The Court concludes that the evidence submitted by plaintiffs is sufficient to raise a genuine issue of material fact with respect to whether Hartzell [here, TCAC] misrepresented, concealed, or withheld the actual cause of propeller failures [here, in-flight break-ups]. According to [Robinson's expert] [here Burton's experts], the true cause of the failures was high vibratory stress . . . [here, rudder flutter] . . . Plaintiffs' evidence raises a genuine issue of material fact as to whether Hartzell [here, TCAC] blamed the failures on other factors, including pilot error and inaccurate tachometers. Based on this evidence, a jury could infer that Hartzell [here, TCAC] was aware of the high vibratory stress. . . [here, rudder flutter problems] but blamed propeller failures [here, in-flight break-ups] on other factors to conceal this problem. (*Robinson* at p. 655).

Prior similar failures constitute "required information" to be provided to the FAA in connection with a full engineering analysis of the failure in issue, per *Butler, supra* (5 identical yoke failures on military helicopters) and *Robinson* (2 reports of same mid-blade propeller model failures along with disputed others). Under similar circumstances, the

Butler Court held that the manufacturer's knowledge of five prior undisclosed military aircraft accidents caused by the failure of identical tail rotor yokes installed in the aircraft satisfied the knowing misrepresentation exception to GARA. It is no answer to this GARA misrepresentation, concealment or withholding claim for TCAC to allege that the FAA, at some time in the past, knew, if it did, of these isolated events;[5] TCAC is "not supposed to wait for the FAA to identify a problem". To the contrary, TCAC had an affirmative responsibility to fully advise the FAA of any safety of flight problem or pattern and to conduct all necessary inspections and tests, and correct any previously provided incorrect information.

TCAC's misrepresentation, concealment and withholding of this required information is causally related to the crash at issue. (CP 1009-1038 – Donham Dec,; CP 1126-1144 – Donham Supp. Dec.). After receipt of SB235, the PGR performed the inspection as recommended. (CP 1438-1440 -Excerpts, PGR Report of Crash (in Spanish); CP 1850-1807 – Excerpts, PGR Report of Crash (English)). Finding no damage, the aircraft was returned to service. *Id.* Nevertheless, 6 months later and 13 months after issuance of SB235, on May 2, 2004, the Twin Commander Model 690C aircraft crashed killing all seven on board. *Id.* At the time, the aircraft was operating normally within the operational flight envelope, when the aircraft suffered incipient flight flutter of the

[5] Reply Brief of Appellants at pp. 20-22.

rudder assembly which caused the in-flight break-up in question. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.; CP 691-699 – Twa Dec.; CP 1120-1125 – Twa Supp. Dec.). Had TCAC accurately represented the facts to the FAA and conducted the required investigation, tests and analysis, the rudder failure and crash would, in all likelihood, have been avoided. (*Id.*) Mr. DeBruge even admitted that "we [TCAC] did not know the reason that [caps] departed these aircraft" at the time SB235 was issued. TCAC should have issued a mandatory service bulletin grounding all affected aircraft until the flutter problem was resolved by appropriate engineering analysis and corrective measures – both to correctly identify the full extent of the problem, its engineering root or primary cause, and corrective action to be taken - and requested an emergency Airworthiness Directive to the same effect be issued by the FAA. The only logical recourse by the FAA would be to ground the affected aircraft in the fleet until the corrective action is done and/or an AD can be issued. (CP 1009-1038 – Donham Dec; CP 1126-1144 – Donham Supp. Dec.). Had these actions been taken, it is probable that owners such as the PGR would have complied with these requirements; the PGR did comply with the inadequate SB235. (CP 1438-1440 - Excerpts, PGR Report of Crash (in Spanish); CP 1850-1807 – Excerpts, PGR Report of Crash (English)). In *Butler*, the Court reasoned that "causation issues ... are matters for resolution by the trier of fact" because it could not conclude that there was no relationship between the

information withheld from the FAA and the accident. *Butler v. Bell Helicopter Textron, supra* at 1087-1088.

2. TCAC is legally not entitled to GARA "manufacturer" status based solely on its status as an FAA type-certificate holder.[6]

SB235, alleged by Burton to be the defective aircraft part in this case, was found by the trial court and affirmed by the Court of Appeals as well as this Court (*via* denial of Respondent's Cross-Petition) not to be an aircraft part under GARA. TCAC cannot, therefore, be a GARA "manufacturer" of this alleged defective aircraft part because SB235 is not an aircraft part.[7] Thus, TCAC wrote SB235 as a type-certificate holder and not as a GARA manufacturer. This well exemplifies the distinction between type-certificate holder status and GARA manufacturer status that the *Sheesley v. Cessna Aircraft Co.,* 2006 WL 1084103 (S.D.S. 2006) court identified and underlines the first prong analysis briefed by Burton

[6] Should TCAC contend that this argument was not made (timely) in the trial court or is unsupported in the record and therefore waived (or similar variation), respectfully, the Court should reject same. Various additional legal issues arose during oral arguments in the trial court – including TCAC's GARA "manufacturer" status. The trial court granted the parties additional briefing authority including unfettered authority to TCAC to brief any legal issues prior to ruling on summary judgment. "You can put anything in your sur rebuttal brief you wish". (RP 64/5-6) TCAC was also given additional authority to request supplemental briefing after reviewing Burton's sur reply brief. TCAC never briefed or requested permission to submit supplemental briefing on the GARA "manufacturer" status issue or objected to Burton's sur reply arguments on this issue. Burton's arguments in his Sur Reply Brief before the trial court (CP 5297-5300) are virtually the same as in his Appellants' Brief (pp. 9-12). As the Court of Appeals confirmed, "In response to the sur reply, Twin Commander did not do so [seek permission for further briefing]." Op. at p. 15, fn. 13.

[7] Burton would have no objection should the Court wish to reconsider Burton as Cross-Petitioner's contention that SB235 was a GARA aircraft part that triggered the "rolling provision" exception, although the Court denied Burton's Petition for Discretionary Review on this issue.

in Respondents' Answer to Twin Commander's Petition for Review. Note the similarities and distinctions between TCAC here and *Schweizer* (*Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543 (Iowa 2002)) and *Precision* (*Burroughs v. Precision Airmotive Corp.*, 78 Cal. App. 4th 681 (2000)). The *Mason* court, finding that *Schweizer* was a manufacturer, held:

> GARA does not define the term "manufacturer". Black's Law Dictionary defines the word as an "entity engaged in producing or assembling new products". Black's L.D. 977 (7th Ed. 1999). In this case, it is undisputed that Schweizer did not make or produce the helicopter or the air filter housing at issue. Nonetheless, it is part of the general aviation industry, and more importantly, is engaged in producing current models of the aircraft at issue here. (emphasis added) (*Id.* at 548).

But TCAC has never "engaged in producing current models of the aircraft at issue here". In accord is *Burroughs*, where Precision acquired the type-certificate and right to produce the Marvel-Schebler line of carburetors. While Precision did not manufacture the carburetor at issue, it did continue to manufacture that same line of carburetors for use in the aviation industry. Again, TCAC did not. The court found that Precision was a successor manufacturer of general aviation aircraft parts, including the carburetors of the type at issue in the case.

We do not know, because TCAC provided no summary judgment proof, if TCAC acquired the liabilities and assets (including the type-certificates) of Gulfstream or just Gulfstream's assets when TCAC acquired the type-certificate from them. TCAC may very well have

acquired just the assets of Gulfstream from a bankruptcy proceeding or other liquidation or receivership consistent with the *Michaud v. Fairchild* 2001 Del. Supr. LEXIS 482 2001 decision. The acquisition occurred in 1989, just a few years before GARA as enacted and at a time when the House Report on GARA claimed that tort cases were crippling the general aviation industry. H.R. Rep. No. 103-525, Pt. 1 (1994). Per the second prong, TCAC provided no summary judgment proof that it acquired Gulfstream's tail of liabilities associated with the model aircraft in question to entitle it to GARA's protection. What we do know, however, is that a successor GARA "manufacturer" "steps into the shoes of the predecessor with regard to the duties of reporting defects". *Burroughs* at 693.

> For instance, a holder of a Parts Manufacturer Approval (PMA), such as Precision, must report to the FAA "any failure, malfunction, or defect in any product, part, process or article manufactured by it" that has resulted or could result in an incident such as engine failure. (14 CFR § 21.3) Precision, as the holder of the PMA on the Marvel-Schebler line of carburetors, was obligated to comply with these reporting requirements even though technically the particular model of carburetor in question here was not "manufactured by it". (*Id.*)

When Burton asserted TCAC's responsibility for the 1970, 1979 and 1982 events relevant to TCAC's misrepresentation/withholding exception to GARA - the "tail of liability" occurring before TCAC's 1989 type-certificate holder status - TCAC chastised Burton, arguing that these three

incidents occurred before its' very existence and acquisition of the type-certificate in 1989 and thus TCAC had no responsibility for these events - there was no legal authority placing a duty on them to report the information. (Reply of Twin Commander in Support of its Motion for Summary Judgment at p. 5). Ironically, TCAC's position is correct only if TCAC did not hold GARA "manufacturer" status such that it did not "step into the shoes of the predecessor manufacturer", Gulfstream, as the aircraft's "new manufacturer". *Burroughs* at 693. If TCAC does not have Gulfstream's "tail of liability", they necessarily lose GARA protection as a "manufacturer."

TCAC also contends, and Burton does not disagree, that "there is no logical reason why a defendant's status under GARA with respect to a particular product or aircraft should turn on what *other* products the defendant may or may not manufacture in support". (Petition for Review at p. 12, fn. 3). Of the 20,000 pages of documents exchanged between the parties in this case, TCAC cites to 31 pages as evidence that it engineers, designs, manufactures and sells replacement parts. (*Id.* at p. 12). Closer scrutiny, however, reveals that these pages actually reference the issuance of TCAC's SB235 and other service bulletins (non-aircraft parts under The Court of Appeals Divison I's decision), that three "vendors" (and not TCAC) actually manufactured the replacement rudder caps incident to SB235, assembly was to be done by the aircraft owner (and not TCAC), and various "*other* products" that TCAC supports that the parties agree

"there is no logical reason" to use to determine TCAC's status under GARA with respect to SB235 and the particular aircraft at issue (*e.g.* the Meggitt/S-Tec (vendor) supported autopilot; environmental control unit upgrades supported by vendor Enviro Systems, Inc.; new main landing gear drag braces supported through an unnamed "vendor") and a Production Certificate for "other" products).[8] These documents do not support TCAC's contention of GARA "manufacturer" status.

IV. CONCLUSION

Respondent, Burton, requests that the Court affirm the two Court of Appeals' holdings of which this Court granted review.

Respectfully submitted this 2ND day of November, 2009.

KRUTCH, LINDELL, BINGHAM, JONES & PETRIE, P.S.

By: _____
Thomas W. Bingham
WSBA #7575
1420 Fifth Avenue, Suite 1350
Seattle, WA 98101
Telephone: 206-682-1505

HAGOOD, NEUMANN & HUCKEBA, L.L.P.

By: _____ for
Gene S. Hagood
SBT 08698400
1520 E. Highway 6
Alvin, TX 77511
Telephone: 281-331-5757

[8] Burton earlier represented that TCAC did not submit evidence that they held a current Production Certificate. (Respondents' Answer at p. 4) Its existence was missed in the review of the some 20,000 pages of documents of this case. TCAC, however, has never used this Production Certificate to manufacture a single aircraft.

CERTIFICATE OF SERVICE

The undersigned certifies that on this the 2ND day of NOVEMBER, 2009, a true and correct copy of this document was served on each of the parties below as follows:

Mr. Clark Reed Nichols
Ms. Mary Gaston
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Kerry V. Kovarik WSBA #40831

THE SUPREME COURT OF WASHINGTON

KENNETH C. BURTON, as Personal Representative of the Estate of ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA BARAJASA VASQUEZ, VIRGINIA DESPOSORIO BARAJAS, ULISES DESPOSORIO BARAJAS, TEOFILO UVALDO DESPOSORIO CABRERA, and IRENE SANTIAGO NAVA,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARCELINO GONZALEZ ALCANTARA, and on behalf of ROSARIO FLORES ALVARADO, EDUARDO GONZALEZ FLORES, DANIEL GONZALEZ FLORES, and CHRISTIAN NANYELI GONZALEZ FLORES,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

NO. 83030-4

ORDER

C/A NO. 60163-6-I

569/117

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA MAGALLANES, ERICK GALINDO ESCAMILLA, and LILLIAN ITZE GALINDO ESCAMILLA,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF PABLO LOZADA LEGORRETA, and on behalf of MARIA DE LOURDES EQUIVEL AVALOS, GERSON FABRICIO LOZADA ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL, and PRISCILLA LOZADA ESQUIVEL,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF CESAR GABRIEL MAYA, and on behalf of STEPHANIE GUADALUPE MAYA

TRIUJEQUE, and DIEGO HANNIEL MAYA TRIUJEQUE,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF JESUS ARCINIEGA NIETO, and on behalf of ANGELICA MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ, and CONSUELO NIETO TAPIA,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION; and DOES 1-20,

Petitioners.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA QUEZADA ELIZARDI, and AIDA MAGDALENA RIOS DE ELIZARDI,

Respondents,

v.

TWIN COMMANDER AIRCRAFT LLC, formerly known and doing business as TWIN COMMANDER AIRCRAFT CORPORATION, and DOES 1-20,

Petitioners.

This matter came before the Court on its September 30, 2009, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That Twin Commander Aircraft's Petition for Review is granted. Review of the issues raised in the Respondent Burton's answer and cross-petition is denied..

DATED at Olympia, Washington this 1st day of October, 2009.

For the Court

CHIEF JUSTICE